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Civil Rights - Racial Discrimination - Fair Housing Act of 1968 - Standing for Testers

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CIVIL RIGHTS—RACIAL DISCRIMINATION—FAIR HOUSING ACT OF 1968—STANDING FOR TESTERS- The Supreme Court of the United States has granted standing under section 804(d) of the Fair Housing Act of 1968 to testers who are given false information concerning the availability of housing.

Havens Realty Corp. v. Coleman, 102 S. Ct. 1114 (1982).

Havens Realty Corporation owned and operated two apartment complexes in Henrico County, Virginia, a suburb of Richmond.[1] One complex, the Camelot Townhouses, was populated predominately by whites while the other, the Colonial Court Apartments, was integrated.[2] Sylvia Coleman, a black female, and R. Kent Willis, a white male, were employed by a nonprofit organization, Housing Opportunities Made Equal (HOME)[3], as testers in an effort to determine whether Havens practiced racial steering[4] in violation of section 804 of the Fair Housing Act of 1968 (Act or Fair Housing Act).[5] On three occasions in March, 1978, Coleman and Willis inquired separately about the availability of apartments in Havens' complexes.[6] On all three occasions Coleman was told that no apartments were available, while Willis was informed that there were vacancies.[7] On July 6, 1978, Coleman again inquired at Havens about vacancies at Camelot Townhouses and was told that no apartments were available; on the same day a white tester was told that there were vacancies at Camelot.[8]

On July 13, 1978, Havens was contacted by Paul Coles, a black actually seeking to rent an apartment, concerning possible vacan-

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1. Havens Realty Corp. v. Coleman, 102 S. Ct. 1114, 1118 (1982).
2. *Id.* at 1118 n.4.
3. *Id.* at 1118. HOME was incorporated under the laws of Virginia and had an avowed purpose of making equal opportunities in housing a reality in the Richmond area. Its 600 person membership was multi-racial. HOME operated a housing counseling service and investigated and referred complaints of housing discrimination. *Id.* at 1119.
4. *Id.* at 1118. Respondent's complaint defined racial steering as the steering, by real estate agents and brokers, of members of racial groups to areas occupied by members of their own race and away from areas occupied by members of other races. *Id.* at n.1.
5. 42 U.S.C. § 3604 (1976).
6. 102 S. Ct. at 1118-19.
7. *Id.* at 1119.
8. *Id.* The white tester was not a party to the complaint. *Id.*

cies at Camelot Townhouses. Coles was told falsely that there were no vacancies.[9]

On January 9, 1979, Coleman, Willis, Coles, and HOME filed a class action suit[10] in the United States District Court for the Eastern District of Virginia,[11] alleging that Havens had practiced racial steering in violation of section 804 of the Fair Housing Act of 1968.[12] In the complaint, Coles alleged that he had been denied the right to rent realty in Henrico County, and Coleman claimed that the false information about available apartments given to her by Havens had caused her specific injury.[13] Additionally, the individual complainants contended that due to Havens' practices, each had been deprived of the benefits that arise from living in an integrated community free from housing discrimination.[14] HOME alleged that its members had been deprived of the benefits of living in an integrated community free from housing discrimination, and that its counseling and referral services had been frustrated, resulting in a drain on its resources.[15]

On a pretrial motion by Havens, the district court dismissed the claims of Coleman, Willis, and HOME,[16] declaring that they lacked

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9. *Id.* at 1118.

10. *Id.* The class consisted of all persons who had rented or sought to rent residential property in Henrico County, Virginia, and who were adversely affected by Havens' discriminatory acts, policies, and practices. *Id.* at n.3. The complaint sought declaratory, injunctive, and monetary relief. *Id.* at 1118.

11. The decision is unreported.

12. 42 U.S.C. § 3604 (1976). § 3604 provides in pertinent part that it shall be unlawful:

> (a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, or national origin.
>
> . . . .
>
> (d) To represent to any person because of race, color, religion, sex, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available.

Id.

13. 102 S. Ct. at 1119.

14. *Id.* Specifically, plaintiffs alleged deprivation of the "important social, professional, business and economic, political and aesthetic benefits of interracial associations that arise from living in integrated communities free from discriminatory housing practices." *Id.*

15. *Id.*

16. *Id.* Following the dismissal of these complaints, the claims of Cole went to trial, a class was certified, and Havens was found to have engaged in racial steering. The district court found that Havens' practices violated both the Fair Housing Act and the Civil Rights Act of 1866, 42 U.S.C. § 1982 (1976 & Supp. IV 1980). The district court entered a consent order granting Coles and the class he represented monetary and injunctive relief. 102 S.Ct. at 1120.

standing and that their claims were time barred by the Act's 180 day statute of limitations.[17] The dismissed plaintiffs appealed, and the United States Court of Appeals for the Fourth Circuit reversed and remanded, holding that Coleman and Willis had alleged sufficient injury both as testers and as individuals deprived of the benefits of living in an integrated community to grant them standing at the pleading stage.[18] The Fourth Circuit also held that HOME had standing both in its own right and as a representative of its members.[19] With respect to the statute of limitations, the Fourth Circuit held that Havens' actions constituted a continuing violation of the Act occurring through July 13, 1978, within the 180 day statute of limitations; therefore, none of the claims were time barred.[20] Havens appealed and the Supreme Court granted certiorari.[21]

Justice Brennan, writing the opinion for a unanimous Court,[22] first considered the issue of standing of the parties.[23] In analyzing the issue, he was guided by the Court's decision in *Gladstone, Realtors v. Village of Bellwood.*[24] Justice Brennan explained that

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17. 102 S.Ct. at 1119. The Act provides: "A civil action shall be commenced within one hundred and eighty days after the alleged discriminatory housing practice occurred. . . ." Fair Housing Act § 812(a), 42 U.S.C. § 3612(a) (1976).

18. Coles v. Havens Realty Corp., 633 F.2d 384, 387-88 (4th Cir. 1980), *aff'd in part and rev'd in part*, 102 S.Ct. 1114 (1982).

19. *Id.* at 390.

20. *Id.* at 393.

21. Coles v. Havens Realty Corp., 451 U.S. 905 (1981).

22. 102 S.Ct. at 1118.

23. *Id.* at 1120. Before the Supreme Court's grant of certiorari, the parties in the present case entered into an agreement, subject to approval by the district court, which provided that if the Supreme Court were to grant certiorari and affirm, or to deny certiorari, respondents would receive four hundred dollars and no further relief. If the Supreme Court were to grant certiorari and reverse, respondents would be entitled to no relief at all. *Id.*

The Supreme Court held that neither of these events rendered the case moot, because respondents here could not claim against the Coles' award, and the letter agreement was merely an attempt to liquidate the damages. Settling upon a measure of damages did not moot their claims and the case retained its adversary character. *Id.*

The Supreme Court did not address the lower court's finding of a violation of 42 U.S.C. § 1982 (1976 & Supp. IV 1980) because that issue was not before it in the present case. 102 S.Ct. at 1120 n.7.

24. 441 U.S. 91 (1979). In *Bellwood*, six individuals and the Village of Bellwood, Illinois, brought suit under § 812(a) of the Act, 42 U.S.C. § 3612(a) (1976), which provides in relevant part: "The rights granted by sections 3603, 3604, 3605, and 3606 of this title may be enforced by civil actions in appropriate United States district courts . . . ." The individual plaintiffs were testers and alleged, *inter alia*, that they had been deprived of the benefits of living in an integrated community. The Court ruled that this was a sufficient injury to grant

the *Bellwood* Court had concluded that Congress intended standing under section 812 of the Act to extend to the full limits of article III of the Constitution,[25] and that courts therefore lacked the power to create prudential barriers to standing.[26] Thus, Justice Brennan noted, to acquire the requisite standing to bring an action under the Act, the plaintiff must allege that he had suffered an injury-in-fact as a result of the defendant's actions.[27] With the *Bellwood* rule as a guide, Justice Brennan examined the standing of each of the respondents.

Noting that the Fourth Circuit had determined that both Coleman and Willis had standing to sue as testers,[28] Justice Brennan addressed the question of tester standing by first finding that section 804(d) of the Act makes it unlawful to provide false information to anyone about the availability of dwellings for sale or rent.[29] He reasoned that Congress had intended by this section to grant a right to truthful information to anyone, including testers.[30] Citing earlier decisions by the Court which had determined that the article III requirement of injury could be met solely by the invasion of a statutorily created right,[31] Justice Brennan declared that if Coleman's allegations were true, then she had suffered injury to her statutory right to truthful housing information in precisely the form against which section 804(d) had been intended to protect.[32]

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standing to the four individuals who were residents of the twelve block area affected by the illegal steering practices of two real estate brokers. *Id.* at 109-12.

25. *Id.* at 103 n.9. *See* U.S. CONST. art. III.

26. 102 S. Ct. at 1121. *See* 441 U.S. at 109.

27. 102 S. Ct. at 1121. The plaintiff must allege that he has suffered a distinct and palpable injury as a result of defendant's actions in order to meet the injury-in-fact requirements. *Id. See* Warth v. Seldin, 422 U.S. 490, 501 (1975).

28. 633 F.2d at 387.

29. 102 S. Ct. at 1121. This is a prohibition made enforceable by § 812(a) of the Act. *See supra* notes 12, 24.

30. 102 S. Ct. at 1121.

31. *See* Linda R. S. v. Richard D., 410 U.S. 614 (1973) (mother of an illegitimate child was found to lack standing to challenge a support statute on the ground that it discriminated between legitimate and illegitimate children); Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 212 (1972) (White, J., concurring) ("[a]bsent the Civil Rights Act of 1968, I would have great difficulty in concluding that petitioners' complaint in this case presented a case or controversy within the jurisdiction of the District Court under Article III of the Constitution"); Hardin v. Kentucky Util. Co., 390 U.S. 1 (1968) (private utility company had standing to sue under statute enjoining Tennessee Valley Authority from supplying power to two towns within the private company's service area).

32. 102 S. Ct. at 1121. A tester with no intention of buying or renting a home could still sustain injuries within the ambit of § 804(d). *Id.*

Willis, on the other hand, had not claimed that Havens had given him false information about available apartments. On each occasion that he inquired, he was told that there were vacancies. Justice Brennan concluded that he had pleaded no injury to his statutory right to truthful housing information and thus had stated no cause of action under section 804(d).[33] He therefore reversed the Fourth Circuit's determination that Willis had standing to sue as a tester.[34]

Justice Brennan next addressed the claims of Coleman and Willis that, regardless of their claims as testers, they had been deprived, as individuals, of the benefits that arise from living in an integrated community because of Havens' steering practices. He ruled that their allegations were sufficient to grant them standing at the pleading stage.[35] Justice Brennan distinguished "neighborhood" standing from "tester" standing[36] by explaining that the injury in neighborhood standing is indirect, while the injury in tester standing is direct.[37] According to Justice Brennan, this indirectness of the injury was of little significance because of the *Bellwood* rule: only injury-in-fact, either direct or indirect, must be alleged.[38] The article III requirement of injury-in-fact would be satisfied, according to Justice Brennan, if Coleman and Willis had alleged distinct and palpable injuries which were fairly traceable to Havens' actions.[39]

Justice Brennan found the neighborhood injuries alleged by respondents[40] to be similar in nature to those found sufficient in *Bellwood*,[41] but noted that *Bellwood* and earlier cases had upheld standing based on neighborhood impact only within relatively

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33. *Id.* at 1122.

34. *Id.*

35. *Id.* at 1124.

36. "Neighborhood" standing is based on an adverse impact upon the plaintiff's community by the steering of someone other than the plaintiff. "Tester" standing is based upon a violation of the tester's own statutory right to truthful housing information. *Id.* at 1122. "The distinction is between 'third party' and 'first party' standing." *Id.*

37. *Id.*

38. *Id.*

39. *Id. See also* Arlington Heights v. Metropolitan Housing Corp., 429 U.S. 252, 261 (1977) (plaintiff must demonstrate that he was himself injured by the defendant's actions, but the injury can be indirect).

40. *See supra* note 14.

41. The plaintiffs in *Bellwood* had alleged injury from the loss of social and professional benefits that arise from living in integrated communities. 441 U.S. at 95.

compact neighborhoods.[42] He agreed with Havens' contentions that respondent's pleadings, which were no more specific than to state that they were residents of Henrico County or of the City of Richmond,[43] did not demonstrate how Havens' steering practices within its housing complexes had affected the particular neighborhoods in which the respondents resided.[44] Justice Brennan agreed with the Fourth Circuit's holding, however, that under the liberal federal pleading standards, dismissal at the pleading stage was inappropriate.[45] He ordered the district court on remand to afford the respondents a chance to amend their complaint to make it more definite, subject to dismissal if they still failed to meet the Supreme Court's guidelines for standing.[46]

Justice Brennan next considered the issue of whether HOME could assert standing in its own right.[47] He applied the same test for standing that he had used with the individual respondents: whether HOME had alleged a sufficient personal stake in the outcome of the suit to warrant the invocation of federal court jurisdiction.[48] The frustration of HOME's ability to provide counseling and referral services and the resulting drain on its resources were sufficiently concrete to constitute injury-in-fact; therefore, Justice Brennan agreed with the Fourth Circuit that HOME had standing to bring an action on its own behalf.[49]

Finally, the Court considered the issue of whether any or all of

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42. 102 S. Ct. at 1123. In *Bellwood*, the area involved was a 12 by 13 block area of the Village of Bellwood. *See* 441 U.S. at 91. In Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205 (1972), the Supreme Court granted standing to sue to two residents of an 8,200 resident apartment complex who claimed they had been denied the benefits of living in an integrated community.

43. 102 S. Ct. at 1123. The population of the City of Richmond was 219,883 and covered 37 square miles. Henrico County covered more than 232 square miles and had a population of 172,922. 633 F.2d at 391 n.5. *See infra* text accompanying notes 59-62.

44. 102 S. Ct. at 1123. Justice Brennan noted the implausibility of the respondent's argument that Havens' discriminatory acts could have affected the entire Richmond metropolitan area. *Id.*

45. *Id.* at 1124.

46. *Id.* Respondents could amend their complaint to identify the particular neighborhoods in which they lived, or establish the proximity of their homes to the housing complexes in which Havens' alleged steering had occurred. *Id.* at 1123.

47. *Id.* at 1124. In its brief to the Supreme Court, HOME had suggested that the Court need not decide whether HOME had standing in its representative capacity. In the letter agreement with Havens, HOME had also agreed to abandon its claim for injunctive relief in its representative capacity if the district court approved the settlement. *Id.*

48. *Id.*

49. *Id.* at 1124-25.

the claims were time barred by the section 812(a) statute of limitations, which requires a suit to be brought within 180 days of the occurrence of a discriminatory housing practice.[50] Noting that statutes of limitations were intended to keep stale claims out of the courts,[51] Justice Brennan agreed with the Fourth Circuit that continuing violations merit different treatment than discrete acts of discrimination.[52] The staleness concern disappears with continuing violations, so complaints challenging unlawful practices and not mere isolated incidents are timely if filed within 180 days of the last occurrence.[53]

The Fourth Circuit had held that all of the claims were based on continuing violations so that none of them were time barred.[54] The Supreme Court affirmed this ruling as it applied to the neighborhood claims of Coleman and Willis and the claims of HOME.[55] Justice Brennan explained that these claims were indeed timely because they were based upon a continuing violation which had been manifested in several incidents, the last of which occurred within 180 days of the complaint.[56] Coleman could not take advantage of the continuing violation theory on her tester claim, however, because she had asserted that on four separate, isolated occasions she had been given false information.[57] Coleman could not claim that the incident involving Coles had deprived her of her right to truthful housing information, and her tester claim, Justice Brennan held, was therefore time barred.[58]

Justice Powell in a concurring opinion,[59] joined in the Court's decision, but expressed concern about the laxity of the pleadings[60]

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50. *See supra* note 17.

51. 102 S. Ct. at 1125. *See* Chase Sec. Corp. v. Donaldson, 325 U.S. 304, 314 (1945) (statutes of limitations are practical devices designed to keep the courts from having to litigate claims after evidence has been lost, memories have faded, and witnesses have disappeared or forgotten the details of the case).

52. 102 S. Ct. at 1125.

53. *Id.*

54. 633 F.2d at 392-93.

55. 102 S. Ct. at 1125.

56. *Id.*

57. *Id.* at 1125-26.

58. *Id.*

59. 102 S. Ct. at 1126 (Powell, J., concurring).

60. *Id.* Justice Powell was concerned about the vague allegations of Coleman and Willis that they were residents of Richmond or Henrico County. *Id. See supra* note 43 and text accompanying notes 43 and 44.

in the case. He emphasized that a distinct and palpable injury still remains the minimum requirement for standing in the federal courts.[61] Justice Powell considered the pleadings of Coleman and Willis alleging deprivation of the benefits of living in an integrated community to be so vague that it was impossible to ascertain whether any injury-in-fact had occurred.[62] *Bellwood* had upheld standing only where the alleged impact of the discrimination had occurred within a relatively compact neighborhood; however, Coleman and Willis had alleged residency broadly in Henrico County or the City of Richmond. Justice Powell was troubled by the vague averment of standing and by the fact that either the district court or counsel for the parties could have sought a more specific pleading under the federal rules.[63] Since neither did, however, both the Fourth Circuit and the Supreme Court had been called upon to review pleadings which gave virtually no indication of a sufficient injury to justify federal jurisdiction.[64] Justice Powell considered this a burden on the federal courts and the parties, as well as a threatened trivialization of the article III injury-in-fact requirement.[65] He concluded that even though the case had reached the Court after nearly four years of futile litigation, it was not within the Court's province to order a dismissal.[66]

The Supreme Court has approached the question of standing from two aspects: the constitutional limitations placed upon federal court jurisdiction, and prudential considerations about the exercise of that jurisdiction. Article III of the Constitution limits the

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61. 102 S. Ct. at 1126 (Powell, J., concurring).

62. *Id.* at 1127 (Powell, J., concurring).

63. *Id.* at 1126-27 (Powell, J., concurring). *See* Warth v. Seldin, 422 U.S. 490, 501 (1975): "[I]t is within the trial court's power to allow or to require the plaintiff to supply, by amendment to the complaint or by affadavits, further particularized allegations of fact deemed supportive of plaintiff's standing."

FED. R. CIV. P. 12(e) provides in pertinent part: "If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, he may move for a more definite statement before interposing his responsive pleading." *See* 102 S. Ct. at 1126-27 (Powell, J., concurring).

64. 102 S. Ct. at 1127 (Powell, J., concurring).

65. *Id.* Justice Powell explained that distinct and palpable injury is a constitutional requirement of standing under article III. *Id. See* Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 102 S. Ct. 752, 758 (1982) (article III requires the party invoking the court's authority to show that he personally has suffered some actual or threatened injury as a result of the defendant's putatively illegal conduct).

66. 102 S. Ct. at 1127 (Powell, J., concurring).

jurisdiction of federal courts to actual cases and controversies.[67] In order to make out an actual controversy, the Court has determined that a petitioner must demonstrate a sufficient personal stake in the outcome of the dispute as to warrant the invocation of the jurisdiction of the federal courts on his behalf.[68] The injury necessary to meet this article III minimum has been variously defined as injury-in-fact,[69] or a distinct and palpable injury.[70]

Recent decisions have greatly expanded the types of injuries that may be alleged in support of standing. Non-economic injuries may suffice,[71] and Congress may enact statutes creating legal rights, the violation of which will give rise to standing.[72] Despite the expansion of the types of injuries which may give rise to standing, all the decisions have emphasized that the petitioner must still allege an injury to himself.[73]

The Supreme Court has also established certain prudential bar-

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67. U.S. CONST. art. III, § 2 provides: "The judicial power shall extend to all Cases . . . ." *Id.*

68. *See, e.g.*, Baker v. Carr, 369 U.S. 186, 204 (1962) ("Have the appellants alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions?").

69. *See* Association of Data Processing Serv. Org. v. Camp, 397 U.S. 150, 152 (1970) (allegation that competition by national banks in providing data processing services might result in future loss of profits to petitioner held to be sufficient allegation of injury-in-fact); United States v. SCRAP, 412 U.S. 669, 686 (1973) (damage to the environment caused by increased freight rates which would reduce recycling of litter held to be sufficient allegation of injury-in-fact).

70. *See* Warth v. Seldin, 422 U.S. 490, 501 (1975); Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59, 72-73 (1978) (allegations of danger to petitioner's environment from construction of nuclear power plants met distinct and palpable requirement).

An additional constitutional requirement for standing, as delineated by the Court, is a fairly traceable causal connection between the injury alleged and the conduct being challenged. *See* Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 261 (1977); Linda R.S. v. Richard D., 410 U.S. 614, 617 (1973).

71. *See* Sierra Club v. Morton, 405 U.S. 727 (1972). The Sierra Club brought a public interest lawsuit to stop federal officials from approving the creation of a ski resort in the Sequoia National Forest. The Court held that environmental concerns were sufficient to grant standing, although it dismissed the Club's claim for lack of standing based on a lack of personal stake in the dispute. *Id.* at 740-41.

72. *See* Linda R.S. v. Richard D., 410 U.S. 614, 617 n.3 (1973); Warth v. Seldin, 422 U.S. 490, 500 (1975); Hardin v. Kentucky Util. Co., 390 U.S. 1 (1968) (private utility company had standing to sue under statute enjoining the Tennessee Valley Authority from supplying power to two towns within the private company's service area).

73. *See* Linda R.S. v. Richard D., 410 U.S. 610, 617 (1973) (party seeking review must himself have suffered an injury); Warth v. Seldin, 422 U.S. 500, 501 (1975) (plaintiff still must allege a distinct and palpable injury to himself).

riers to standing, focusing primarily upon the question of whether the petitioner is the proper party to bring the claim he wishes to have litigated before the courts. The prudential barriers to standing established by the court include: (1) the petitioner must allege more than a generalized grievance shared in equal measure by a large number of persons, and (2) petitioner must usually assert his own rights and cannot base a claim on the rights or interests of another.[74] Congress may, however, grant an express or implied right of action to parties who would be otherwise barred by the Court's prudential limitations.[75] Both the prudential and the constitutional limitations defined by the Court underscore that the focus of standing is on the petitioner, and not upon the issues he wishes to have litigated.[76]

The Supreme Court has tended to broadly construe standing requirements in cases involving matters of important public policy. This is especially true in the area of civil rights, as illustrated by *Evers v. Dwyer*[77] and *Pierson v. Ray*.[78] In these two cases, relied upon by Justice Brennan in his *Havens* opinion, the Supreme Court granted standing to testers to challenge local segregation ordinances. Evers was a black resident of Memphis, Tennessee, who boarded a municipal bus and seated himself in the white section.[79] Evidence presented in the case showed that Evers had never previously ridden the Memphis buses, and did so on the occasion in question solely for the purpose of bringing litigation to challenge a Tennessee statute which required segregated seating on buses.[80] The Court held that the tester status of Evers was insignificant, that an actual controversy between parties with adverse interests nevertheless existed, and that the case deserved to be heard on its

74. 422 U.S. at 501.

75. *Id.* Prudential barriers in Fair Housing Act suits were eliminated in Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91 (1979), and Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205 (1972). *See supra* notes 86-88 and accompanying text.

76. Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 38 (1976) ("standing focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated").

77. 358 U.S. 202 (1958) (per curiam).

78. 386 U.S. 547 (1967).

79. 358 U.S. at 203-04. Appellant boarded the bus on April 26, 1956 and seated himself in the front. The driver told him to move to the rear, stating that it was required by his color. When police arrived, appellant left peacefully. *Id.* at 204.

80. TENN. CODE ANN. §§ 65-1074 to 65-1079 (1955).

merits.[81] The Court explained its decision by saying that any resident of a municipality who could not ride its buses without being subject to special disabilities by statute had a real, immediate and substantial interest in challenging the validity of that statute.[82]

The petitioners in *Pierson* were an integrated group of clergymen who attempted to use segregated facilities in an interstate bus terminal in Jackson, Mississippi, fully expecting to be arrested for their acts.[83] The Supreme Court held that the fact that the clergymen anticipated their arrest did not constitute consent to that arrest nor deprive them of the right to sue for damages stemming from it.[84] This was true, stated the Court, even if the clergymen had been acting solely to test their right to integrated public facilities.[85]

Consistent with decisions such as *Evers* and *Pierson* in other areas of civil rights, the Supreme Court has liberally construed standing requirements under the Fair Housing Act. In two important cases, *Gladstone, Realtors v. Villiage of Bellwood,*[86] and *Trafficante v. Metropolitan Life Insurance Co.,*[87] the Court eliminated prudential barriers to standing under the Act's enforcement provisions.[88] The rationale behind these decisions is that anyone who is injured by a discriminatory housing practice, either directly or indirectly, should be entitled to bring an action under the Act.[89] Even with the liberal basis for standing established by these decisions, however, there still remained the requirement of a personal

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81. 358 U.S. at 203 A three judge district court had dismissed the case on the grounds that there existed no real controversy. The Supreme Court remanded to the district court for a hearing on the merits.

82. *Id.* at 204.

83. 386 U.S. at 558.

84. *Id.* at 549-50. After their arrest, petitioners waived a jury trial and were convicted by respondent police justice. One petitioner was awarded a trial *de novo* on appeal and received a directed verdict in his favor. The cases against the other petitioners were then dropped. Petitioners then filed an action in the district court for damages under 42 U.S.C. § 1983 (1976) against respondent police justice, and against the arresting officers at common law for false arrest and imprisonment. 386 U.S. at 549-50.

85. 386 U.S. at 558.

86. 441 U.S. 91 (1979).

87. 409 U.S. 205 (1972).

88. 42 U.S.C. §§ 3610, 3612 (1976). Section 3610(a) provides for a conciliation procedure through the Department of Housing and Urban Development in an attempt to settle disputes without necessitating resort to the courts. *Id.*

89. *See* 409 U.S. at 211; 441 U.S. at 112.

stake in the outcome of any claim brought under the Act.[90] The plaintiff either had to show that he was frustrated in obtaining housing by a direct injury to his section 804 rights, or that he was a resident of a community which had been adversely affected by a violation of the section 804 rights of another.[91]

Havens is the first case to hold that standing is available to testers for violations of section 804(d) of the Act. Although nearly universally accepted by the courts in Fair Housing Act cases, testers have been used primarily in an evidentiary role.[92] For a tester to be himself a plaintiff, he had to rely on an indirect injury theory, usually that of being a resident of a community which had been adversely affected by a discriminatory housing practice.[93]

The Fourth Circuit, in granting tester standing to Coleman and Willis, did not suggest that they had suffered direct injury under the Act, but rather granted standing on public policy grounds.[94] The court declared that the elimination of housing discrimination was such an important public concern that it justified the extension of standing to testers.[95] The court emphasized, however, that the testers were not directly injured by the false information they had been given, as they were really acting only as surrogates for bona fide housing seekers.[96]

The Supreme Court did not follow this public policy rationale, however, and instead announced for the first time that section

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90. *See* 409 U.S. at 211 (loss of benefits of living in an integrated community was a particular injury and so there existed a controversy).

91. *See* Trafficante v. Metropolitan Life Ins. Co., 409 U.S. at 213 (section 810(a) was meant to give standing to all in the same housing unit who were injured by racial discimination in its management).

92. *See* Skinner, *Fair Housing, the Use of Testers to Enforce Fair Housing Laws, When Testers are Sued,* 21 ST. LOUIS U.L.J. 170 (1977). Only § 804(a) of the Act requires a bona fide offer to rent or purchase, so violations against testers of the other sections of 804 are admissible to prove that a defendant has engaged in practices which violate the Act. The evidence thus gathered by testers is used to help prove the case of someone who was actually seeking housing. *See* Zuch v. John H. Hussey Co., 394 F. Supp. 1028 (E.D. Mich. 1975) *aff'd mem. and remanded,* 547 F.2d 1168 (6th Cir. 1977) (use of testers is permissible and does not constitute entrapment); Marr v. Rife, 503 F.2d 735 (6th Cir. 1974) (use of white testers permitted in determining whether real estate agency practiced discrimination against blacks).

93. *Bellwood* and *Trafficante* had held that the loss of the benefits of living in an integrated community was an indirect injury but was still sufficient to afford standing to residents of affected communities. *See* 409 U.S. at 212; 441 U.S. at 112.

94. 633 F.2d at 387.

95. *Id.*

96. *Id.*

804(d) created a right to truthful housing information in all persons, the violation of which will create standing.[97] This decision is difficult to justify in view of the article III requirement of a direct personal stake in the outcome of a controversy. Despite the fact that Coleman was given false housing information, she arguably had no personal stake as a tester in the *Havens* case beyond that of a concerned citizen interested in ensuring equal housing opportunities for everyone. In *Sierra Club v. Morton*,[98] the Court refused to grant standing to such a party, saying that to do so would result in the courts becoming a vehicle for enforcing the value preferences of interested bystanders,[99] a clear violation of the article III limitation of jurisdiction to actual controversies between parties with adverse interests. The doctrines of standing were developed to ensure that all claims reaching the federal courts would be presented in such a form.[100] Never before the *Havens* decision had a court considered the giving of false information to testers a sufficient injury to grant them standing, or even that Congress had intended to create a right of action in testers. The real injury in *Havens* was done only to actual housing seekers, or to residents of communities adversely affected by Havens' discriminatory practices. Coleman was indeed given false information, but it is difficult to discern what injury she suffered thereby.

Apparently, the Supreme Court shared the Fourth Circuit's view that fair housing was such an important public concern that it warranted the extension of standing to testers, but preferred to justify this decision within traditional standing requirements. Only by creating a section 804(d) right to truthful housing information could the Court do so. Nevertheless, Coleman, as a tester, does not meet previous Fair Housing Act standing requirements, as she was neither an actual housing seeker, nor claiming residency in a community affected by Havens' steering.[101]

The Fourth Circuit's public policy rationale for granting tester standing is more appealing than the Supreme Court's manipulation of the article III requirements, but is itself questionable. The Fourth Circuit, like the Supreme Court, relied on *Evers* and *Pier-*

97. 102 S. Ct. at 1121.
98. 405 U.S. 727 (1972).
99. *Id.* at 735.
100. *See* Baker v. Carr, 369 U.S. 186 (1962); Flast v. Cohen, 392 U.S. 83 (1968).
101. *See supra* note 91 and accompanying text.

son in justifying tester standing, stating that those cases were similar to *Havens*. *Evers* and *Pierson* are distinguishable, however, in that they involved challenges to statutes aimed at disabling an entire race. The petitioners in those cases were not only members of the race against which the statute discriminated, but also risked arrest by performing their testing acts.[102] Under those circumstances, it would seem that the testers in *Evers* and *Pierson* had a greater personal stake than the *Havens* testers, and also that it would be difficult to find someone willing to challenge the validity of the discriminatory statutes. The statute involved in *Havens*, however, was an enforcement statute, so Coleman was taking no risk in performing her testing activities. Additionally, *Bellwood* and *Trafficante* had created such a broad basis for standing in Fair Housing Act cases[103] that there is really no need to grant standing to testers to ensure enforcement of the Act.

The extension of standing to testers by the Supreme Court's *Havens* decision is an unfortunate broadening of the standing requirements under the Fair Housing Act. Nothing in the language of the Court's opinion requires that the testers allege any real interest in a particular case except that of a citizen interested in ensuring equal housing opportunities for all. While there is real merit in some of the grievances alleged in *Havens* itself, the decision could lead to the courts becoming increasingly burdened with suits brought by parties seeking to vindicate their own values in a legal setting.

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102. Indeed, petitioners in *Pierson* were actually arrested. 386 U.S. at 549.
103. *See supra* notes 86-88 and accompanying text.